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[illegible] Commission [illegible]

On appeal from the District Court for the Eastern District of North Carolina

[illegible] Economic Stabilization Director [illegible] of the Office of Price Administration, Appellants,

v.

The United States of America, Interstate Commerce Commission, the Alabama Great Southern Railroad Co., et al.

On appeal from the District Court for the Western District of Kentucky

BRIEF FOR APPELLANTS

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637103—45——1

## CITATIONS

Cases:

# In the Supreme Court of the United States

October Term, 1944

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No. 561

Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, appellants

*v.*

The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

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*ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA*

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No. 592

Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, appellants

*v.*

The United States of America, Interstate Commerce Commission, the Alabama Great Southern Railroad Co., et al.

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*ON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY*

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## BRIEF FOR APPELLANTS

## OPINIONS BELOW

The opinion of the District Court for the Eastern District of North Carolina, entitled *State of North Carolina* v. *United States,* is reported in 56 F. Supp. 606 (561–R. 548).[1]

The opinion of the District Court for the Western District of Kentucky, entitled *State of Alabama* v. *United States,* is reported in 56 F. Supp. 478 (592–R. II, 1345–1362).

The Report of the Interstate Commerce Commission in *Alabama Intrastate Fares* and related cases is reported in 258 I. C. C. 133 (561–R. 69, 592–R. I, Ex. B, p. 1). The Commission's Corrected Order of May 8, 1944, is printed as Appendix A to this brief.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 210 of the Judicial Code, U. S. C. Title 28, Section 47a.

The Order of the District Court for the Eastern District of North Carolina was entered July 22, 1944 (561–R. 545). The petition for appeal was duly presented to the District Judge and an order was signed allowing the appeal on September 18, 1944 (561–R. 587). Probable jurisdiction was noted by this Court on November 13, 1944 (561–R. 596).

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[1] This brief involves two printed records which are separately designated in this brief by the numbers of the two appeals. The record in the appeal of the North Carolina case is designated 561–R. The other record is designated 592–R.

The Order of the District Court for the Western District of Kentucky was entered on August 3, 1944 (592–R. II, 1362). The petition for appeal was duly presented to the District Judge and an order was signed allowing the appeal on September 29, 1944 (592–R. II, 1379). Probable jurisdiction was noted by this Court of November 13, 1944 (592–R. II, 1393).

## QUESTION PRESENTED

The question presented by the Economic Stabilization Director and Price Administrator is whether the action of the Interstate Commerce Commission, in annulling the orders of the State Commissions denying intrastate passenger fare increases not presently necessary, constituted an unlawful application of section 13 (4) of the Interstate Commerce Act, both because of the Commission's failure to apply the criterion for the application of that provision which has been established by the decisions of this Court, and also because of the Commission's disregard of wartime conditions and the stabilization legislation.

## STATUTES INVOLVED

The following statutory provisions are printed in Appendix B to this brief.

Section 13 (4) of the Interstate Commerce Act, 49 U. S. C., sec. 13 (4).

Section 15a of the Interstate Commerce Act, 49 U. S. C., sec. 15a.

Section 1 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. App., Supp. III, sec. 901.

Section 1 of the Stabilization Act of 1942, 50 U. S. C. App., Supp. III, sec. 961.

## STATEMENT

### 1. HISTORY OF THE PROCEEDINGS

Prior to the proceedings involved in these appeals the railroads operating in Southern Passenger Association territory (herein called the railroads) filed a petition with the Interstate Commerce Commission in July 1942, seeking permission to increase interstate passenger coach fare from the general basis of 1.65 cents to 2.2 cents per mile.[2] By an order of August 1, 1942, under the proceeding in Ex Parte 148, *Increased Railway Rates, Fares, and Charges, 1942*, the Commission authorized the railroads to apply increases of 10 percent to fares on the basis of 2 cents rather than 1.5 cents per mile, on the ground that they were already entitled to avail themselves of the 2-cent fares which had been authorized on a nation-wide basis in *Passenger Fares and Surcharges*, 214 I. C. C. 174 (561-R. 72-73; 592-R. I, Ex. B., pp. 8-9, and II, 982).

A tariff was filed on behalf of the Southern railroads, effective October 1, 1942, making the increase of fares authorized by the Interstate Commerce Commission. These increases were protested by the Price Administrator, but the Com-

[2] See Report of the Interstate Commerce Commission, 561-R. 73; 592-R. I, Ex. B, p. 8.

mission declined to suspend (561-R. 73; 592-R. I, Ex. B., p. 9).

By procedures in compliance with State laws, the railroads then sought increases of intrastate fares to the level of those effective in interstate commerce. After hearings, at which the Price Administrator appeared as protestant, the State commissions of Alabama, Kentucky, North Carolina, and Tennessee refused to authorize the increases, on the ground that the carriers had failed to show that the increased fares and revenues were just and reasonable.[3] The Kentucky Railroad Commission expressly referred to the stabilization legislation and the President's "Hold-the-Line" Order of April 8, 1943, as one of the bases for its action (592-R. II, 1071).

The North Carolina Utilities Commission filed a petition with the Interstate Commerce Commission in July 1943, seeking an investigation into the reasonableness of the interstate fares in North Carolina (561-R. 384). Soon afterwards, petitions were filed with the Interstate Commerce Commission by the Alabama Public Service Commission and by the Price Administrator seeking an investigation into the reasonableness of the interstate level of fares in the

[3] See the reports of each of the four State Commissions:
Alabama, 592-R. II, 439.
Kentucky, 592-R. II, 1062.
North Carolina, 561-R. 128.
Tennessee, 592-R. I, Ex. B., p. 49.

Southern region. These three petitions were denied by the Interstate Commerce Commission without formal hearing or report (561–R. 81; 592–R. I, Ex. B, pp. 19–20).

Following the States' denial of the increases of fares, the principal railroads operating in each of the four States filed separate petitions with the Interstate Commerce Commission seeking orders under section 13 (4) of the Interstate Commerce Act to require increases in the intrastate rates of these four States to the level of the interstate fares. The Commission instituted investigations by four separate orders, and conducted four separate hearings. The Price Administrator, on his own behalf and on behalf of the Economic Stabilization Director, appeared in each of the four proceedings and introduced evidence in all but the Alabama case (561–R. 70–71; 592–R. I, Ex. B., pp. 5–6). The examiner in the Alabama and Kentucky cases issued two separate proposed reports denying the relief sought by the railroads operating in those States (592–R. II, 513, 1077).

The cases were argued together before the Interstate Commerce Commission, and decided in one report, *Alabama Intrastate Fares, supra.* The Commission found (1) that the interstate fares on the basis of 2.2 cents per mile are just and reasonable; (2) that the intrastate fares in Alabama, Kentucky, North Carolina and Tennessee were lower than interstate fares; (3) that passenger

transportation conditions in interstate and intrastate commerce are substantially similar; (4) that such transportation in the same trains and generally in the same cars results in undue and unreasonable advantage and preference of the intrastate passengers and undue and unreasonable disadvantage and prejudice of interstate passengers; (5) that the lower intrastate fares produced at least $2,275,000 per annum less than if the level of interstate fares had been in effect, and traffic moving under the lower intrastate fares "is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service"; and (6) that maintenance of the lower intrastate fares resulted in violation of section 13 (4) of the Interstate Commerce Act. The Commission held that the unlawfulness should be removed by increasing the intrastate fares to the interstate level (561–R. 95; 592–R. I, Ex. B., pp. 37–38).

On April 26, 1944, the Price Administrator duly filed a petition for reconsideration of this decision, as did all of the other appellants (561–R. 412; 592–R. II, 466). All petitions were summarily denied by an order of May 8, 1944 (561–R. 508).

By a separate order of May 8, 1944, corrected by another order of the same date, the Commission required the railroads to increase their intrastate fares in Alabama, Kentucky, North Carolina, and Tennessee to the interstate level

(printed as Appendix A to this brief. See 561-R. 507; 592-R. I, Ex. A., p. 1). This is the order against which these suits were brought.

The North Carolina appellants filed petitions in the District Court for the Eastern District of North Carolina upon many grounds, seeking an injunction to set aside the order of the Interstate Commerce Commission as unlawful; and the appellants in the Alabama, Kentucky, and Tennessee cases sought similar relief in the District Court for the Western District of Kentucky.[4] The three-judge district courts convened to hear the cases declined to enjoin and set aside the order of the Commission and dismissed the complainants; whereupon these appeals were taken to this Court.

The recent history of passenger coach fares in the South is of considerable importance to an understanding of this case, and its explanation at this point will bring out implications of facts not readily seen from the Commission's report.

## A HISTORY OF SOUTHERN PASSENGER COACH FARES

The prewar basis of "standard" or coach fares in the Southern region was established on December 1, 1933, at the level of 1.5 cents per mile one-way. The railroads and the Commission described the basis of fares as "experimental", "to

[4] For Price Administrator's petitions, see 561-R. 38, 592-R. II, 1098. Because of the similarity in form and context, the petitions in the *Alabama* and *Tennessee* cases were omitted from printing.

attract traffic that had been diverted chiefly to private automobiles" (561–R. 71, 74; 592–R. I, Ex. B., pp. 6, 7, 10).

In 1936 the Commission concluded an investigation of the level of passenger fares over the entire country and required the railroads to establish fares of not more than 2.0 cents per mile, which resulted in reductions of fares for some railroads, although many Southern and Western carriers had even lower fares in effect. *Passenger Fares and Surcharges, supra.* While these fares were below the costs of the service, the Commission justified its action upon the fact that competition from motor vehicles had made railroad passenger travel unprofitable, and the fact that lower fares would attract traffic and produce greater total revenues (214 I. C. C. at 230–232). But, moreover, compensation for the deficits was provided. The Commission pointed out that it had given consideration to the necessity of supporting the passenger service when it established general levels of freight rates (214 I. C. C. at 225–227). In that 1936 report, the Commission made the following specific finding with respect to the lower fares of the Southern region:

> There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results

> than the higher fares. These matters are left to the discretion of respondents. (Finding No. 11, at p. 255)
>
> The present experimental fares in the southern * * * district(s) * * * are not unreasonable or otherwise unlawful. (Conclusion No. 3, at p. 257)

The higher basis of fares on the 2 cents level was tried by the Southern railroads for 14 months ending January 15, 1939; but the former basis of 1.5 cents per mile was then restored for the reason stated in identical language by the railroads' evidence in each of these four records that "it would be to their advantage to restore the former one-way coach fare of 1.5 cents per mile."[5] The railroads' evidence shows that 1938 revenue per coach mile was less than for 1937 by 7.6 percent in Kentucky, 11.4 percent in North Carolina, and 10.3 percent in Tennessee, as compared with a decline of revenues per parlor and sleeping car mile of 4.8 percent in Kentucky, a slight increase in North Carolina, and a decline of 2.7 percent in Tennessee. Following a lag in 1939 in which year the fares were reduced, coach-mile revenues increased in 1940 over 1938 by 3.7 percent in Kentucky, 19.4 percent in North Carolina, and 4.9 percent in Tennessee, in striking contrast to declines of revenue in parlor and sleeping cars in each of the three States. The Alabama record does not contain data separately for the two

[5] 561–R. 300; 592–R. I, Ex. B., p. 72, II, 556–557, 1148–1149.

classes of service, but revenue per passenger-carrying car-mile dropped 6.8 percent from 1937 to 1938, and decreased slightly from 1938 to 1940.[6]

On January 21, 1942, in Ex Parte 148, the Interstate Commerce Commission issued an order authorizing the railroads of the country to increase all passenger fares by 10 percent to compensate for increased wartime expenses, particularly those resulting from increased wage awards. *Increased Railway Rates, Fares, and Charges, 1942,* 248 I. C. C. 545. The increases became effective on February 10, 1942, raising the Southern passenger fares from the general basis of 1.5 to 1.65 cents per mile. This increase of 10 percent in passenger fares was made effective for the duration of the war and six months thereafter. With respect to the effect of the increase upon passenger traffic, the Commission said (248 I. C. C. 565):

> Because of the *abnormal* conditions which now prevail throughout the country, we are of the opinion that increased fares proposed will yield substantial amounts of

[6] The data from which all of these percentages were computed were part of the railroads' evidence in the case. An abstract of these data with reference sources in the Records, is set forth as Appendix C to this brief. This appendix makes a statistical comparison of the effect of the coach fare increases from 1.5 to 2 cents per mile for the period from Nov. 15, 1937, to Jan. 15, 1939, with the effect of the same increase when applied under wartime conditions in which there is so much less in competition from motor vehicles.

additional revenues * * *. [Italics added.][7]

In 1943, upon petition of Appellants herein, the Commission reopened Ex Parte 148 and suspended the freight rate increases authorized in the prior year, but retained the passenger fare increases of 10 percent because passenger traffic had not become as profitable as the freight traffic and because the increased fares would tend to discourage passenger travel. "*Increased Railway Rates, Fares, and Charges, 1942,* 255 I. C. C. 357,

[7] In a subsequent report of Dec. 12, 1944, 259 I. C. C. 159, 187, in the same proceeding, the Commission said:

"Passenger traffic in recent war years has increased greatly because of movements of troops, the furlough travel of persons in the military services, and travel by relatives visiting persons in the services, increases in national income, curtailed service by competing passenger carrying agencies, and severe restrictions in the amounts of gasoline and tires available for private automobile use. It is estimated that 17 percent of present passenger traffic is military traffic, and about 16 percent military furlough traffic.

"*Effects of wartime conditions upon rail passenger traffic are particularly noticeable in the data submitted for railroads in the southern region.* In that region, passenger revenues in 1943 as compared with those in 1939 increased to a greater extent than in other sections or in the country as a whole. Passenger revenues of southern region railroads amounted to $45,901,905 in 1939. They were $283,000,000 in 1943, an increase over 1939 of about 516 percent * * * *The great increase in the southern region is due to the curtailment in other modes of travel, particularly in the use of private automobiles, and to the establishment in that region of a large number of military training camps.* * * *" [Italics added.]

394–5. Mention was made of the increased Southern passenger fares, effective October 1, 1942, and of the fact that except in Mississippi all intrastate fares were still on the lower basis (pp. 286–7).

In other words, except for the 10 percent fare increase, it was not until the present Section 13 (4) proceeding that the Commission allowed the Southern railroads to make the increases which shortly before the war they had found to be impractical and which had become profitable only because of wartime conditions such as the movement of military personnel and wartime scarcities or rationing of gasoline, tires, and automobiles. How great the effect of wartime passenger traffic increases has been upon railroad revenues is shown on pages 48 and 49 of this brief.

On December 12, 1944, the Commission again reconsidered the 10 percent passenger fare increases in the last-cited proceeding. The Commission refused to suspend the increases, however, for substantially the same reasons given in the report involved in these appeals. The report compared present fares with those in effect after the first World War, and the Commission pointed out that the 1942 passenger service operating ratio had been decidedly less favorable than for the freight service. No weight was given to the sharp increases of passenger traffic in 1943 and 1944 which brought down the passenger operating ratio nearly to the level of the operating ratio for the

freight service. The Commission's apparent belief that the railroads should be allowed to recoup for past deficits is reflected in an observation in one of the concluding paragraphs that "Passenger traffic for the entire period 1930 to 1941, inclusive, failed to pay its proper share of expenses." *Increased Railway Rates, Fares, and Charges, 1942,* 259 I. C. C. 159, 194.

### 3. OPINIONS BELOW.

The opinions of the District Courts for the Eastern District of North Carolina and the Western District of Kentucky are quite similar, differing principally in that the Kentucky Court did not pass upon the validity of the Commission's finding with respect to undue preference to intrastate travelers and prejudice to interstate passengers.

The common issue in the two decisions of the District Courts was the question whether the lower intrastate fares imposed a revenue burden upon interstate commerce. We joined the States in contending that passenger fares on the basis of 1.65 cents per mile sufficed under existing wartime traffic conditions to provide the railroads with a reasonable rate of return. The Kentucky court conceded the factual basis for this contention, saying: "That may be the result, at least temporarily. But the proposed increased rates are not based on the need for additional revenue. The proposed increase is for the purpose of removing an unjust discrimination against interstate commerce which

the Commission is empowered to do regardless of resulting increased revenues or the non-existence of any need for the same." The court also observed that "present large revenues flow from abnormal traffic conditions, clearly only temporary in their nature. With the return to normal conditions, including the resumption of strong competition from trucks and busses, the combined returns may not be unreasonable." (592-R. II, 1359.)

The North Carolina District Court said: "It is argued, also, that it was incumbent upon the Commission, in condemning intrastate fares as discriminatory, to determine the reasonableness of interstate fares in the light of existing conditions and not of conditions that existed in former years; but it is clear that the Commission had had existing conditions in mind in finding the interstate fares to be reasonable. It is well settled that ordinarily the experience of a single year is an unsafe guide in fixing prices * * *. Particularly is this true when the single year is a war year and the conditions are abnormal." (561-R. 563-564.)

The North Carolina District Court, having approved the Commission's finding with respect to the reasonableness of the fares, concluded that: "The reasonableness of the interstate fares being established, there can be little question as to the discriminatory character of the intrastate fares. It is established that the same service is afforded intrastate passengers as is afforded in interstate

service; and, where this is true, discrimination is ordinarily established with sufficient certainty by showing a difference in rates, * * *" (561–R. 567), "And it is equally clear that discrimination has been shown within the meaning of the statutory provision against the interstate commerce of the carriers in that, because of the intrastate fare, intrastate passengers are not making their proportionate contribution to the maintenance of the transportation system." (561–R. 568.)

Neither court attempted to distinguish the line of reasoning followed by them from the rule laid down by this Court that "the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." *Florida v. United States*, 282 U. S. 194, 212.

The North Carolina Court relied for authority on *Illinois Commerce Commission v. United States*, 292 U. S. 474, 485, failing to note, however, that in that case, as this Court observed, the "Commission had before it evidence showing that the cost of the traffic largely exceeded the revenue derived from the old rates", and that there were additional facts showing undue preference, prejudice, and burdens upon interstate commerce.

## SPECIFICATION OF ERROR TO BE URGED

The District Courts erred as a matter of law in concluding that the findings and order of the

Interstate Commerce Commission were based on substantial evidence, did not involve errors of law, and were not arbitrary or unreasonable. In particular, the District Courts erred, as a matter of law, in concluding that there was substantial evidence of record to sustain, consistently with the Commission's duty to "give full effect to wartime conditions and the stabilization legislation", the Commission's finding that an undue, unreasonable, and unjust discrimination against interstate commerce, within the meaning of section 13 (4) of the Interstate Commerce Act, had resulted from the decisions and orders of the four State commissions declining to authorize intrastate passenger fare increases under wartime conditions productive of net revenues (including net passenger operating revenues) in excess of those required to meet maintenance and operating costs and to yield a fair return.

## SUMMARY OF ARGUMENT

The contention advanced in this case by the Economic Stabilization Director and the Price Administrator is simple but fundamental. We contend that the Commission did not apply the proper criterion in reaching, and the District Courts erred in upholding, the Commission's fifth finding that "traffic moving under these lower intrastate fares is not contributing its fair share of revenues *required* to enable respondents [the railroads] to render adequate and efficient trans-

portation service." [Italics added.] This finding was essential to the Commission's decision that the intrastate fares discriminated unjustly against interstate commerce, in view of the interpretation placed upon Section 13 (4) of the Interstate Commerce Act in the *First Florida Log Case*, 282 U. S. 194, and later decisions.

1. The criterion of undue revenue discrimination against interstate commerce, as established by the decisions of this Court, is the sufficiency of the contribution made by the intrastate rates or fares to the revenues required by the railroads to enable them to maintain adequate and efficient transportation service. A proper application of this criterion requires the Commission to make determinations on two distinct questions: (1) whether the railroad revenues are greater or less than the amount actually required for adequate and efficient transportation service; and (2) whether the intrastate fares enable the intrastate traffic to make a sufficient contribution to the amount of required revenues.

The controlling criterion could not be satisfied by the determination made by the Commission that the interstate fares were reasonable and that the lower intrastate fares were charged for substantially the same service. Neither of these determinations is incompatible with determinations that the railroad revenues were in fact higher than actually required and that the intrastate fares did made a sufficient contribution to

the revenues which in fact were required. It is evident, therefore, that the Commission did not properly apply the controlling criterion in reaching its basic fifth finding.

2. If the Commission had sought to apply the proper criterion in these proceedings, the evidence of record would not have permitted it to make the basic determinations which, under this criterion, were necessary to sustain its order.

A. The Commission could not properly have determined, on the evidence of record, that the then prevailing level of railroad revenues was no higher than that required to enable the railroads to render adequate and efficient transportation service. On the contrary, the level of revenues was then far higher than enjoyed by the railroads in peacetime, and was yielding a rate of return in excess of the rate needed to sustain such service. Moreover, in such slight consideration as the Commission gave to the railroads' rate of return, it erred in relying upon a palpably excessive rate base and in calculating net revenue after all income and excess profits taxes.

B. Not only was there no evidence of record to show that, under the lower intrastate fare, the intrastate passenger traffic was not making a sufficient contribution to required revenues, but the evidence points irresistibly to the contrary conclusion. The mere existence of the disparity between interstate and intrastate fares, even if charged for

substantially the same service, could not sustain a finding that the lower intrastate fares were not contributing a sufficient share of the required revenues, in view of the following considerations:

(a) The 1.5 cents passenger fares in the southern states were expressly approved by the Commission as reasonable when in 1936 it ordered 2.0 cents fares elsewhere.

(b) Such additional revenues as the Commission found necessary to meet increased costs due to war were provided when in January, 1942, the Interstate Commerce Commission authorized the 10 percent increases for *both* the 1.5 cents and 2.0 cents fares.

(c) Those increased revenues have more than met the increased costs due to war; indeed, with the greatly increased volume of business has come the greatest and most profitable volume of passenger traffic in railroad history, resulting in more than a fair return from the wartime increase of passenger fares.

(d) The Commission had long subsidized passenger service deficits from a support factor in peacetime freight rates which has not been removed, but which has been multiplied in its effect by the wartime increase of freight traffic.

(e) The intrastate passenger fares of 1.65 cents per mile were shown by data of record to be approximately at the level of the average of all fares (including fares at furlough rates of 1.25 cents per mile) collected by the railroads and well above their cost of operating the passenger service.

(f) The 1.65 cents intrastate fares had been found reasonable by each of the four State commissions.

3. The fifth finding of the Interstate Commerce Commission may not lawfully be based on the supposition that, *after the war*, the railroads would require all the revenues that could be produced by uniform 2.2 cents interstate and intrastate fares and that, therefore, the intrastate fares should be raised *now*. Such reasoning would disregard—

(a) the Commission's duty to give full effect to the national stabilization program, since it would allow the railroads to take advantage of wartime shortages and wartime travel needs to impose immediate, direct, and unnecessary increases in the cost of living, at a time when inflationary dangers are greatest, merely to anticipate a conjectural future contingency;

(b) the Commission's statutory duty to coöperate with State commissions, a duty rendered especially imperative where the State commissions' action has been in accord with (and in one instance expressly in response to) the President's admonition to all Federal, State, and municipal agencies to disapprove rate increases in order to keep down the cost of living and to effectuate the purposes of the stabilization program;

(c) the fact that, since under peacetime conditions the railroads' own experience demon-

strated that 1.5 cents per mile was the most profitable passenger fare, the higher fares would not actually contribute to postwar revenues but would merely exploit temporary wartime shortages and travel needs.

It is difficult to escape the conclusion that the Commission overrode considered judgments of the State commissions, not because the 1.65 cents intrastate fares are unreasonable, not because the railroads need more revenues now, and not because they would need a 2.2 cents intrastate fare in the future, but simply because they could exact that fare from their wartime traffic so that their surpluses, augmented by this exaction, would give comfort for lean years.

Such reasoning, if pursued by railroad managements, would be natural enough. To charge what the traffic will bear is what a seller in the market is expected to do. Indeed, that is one of the principal reasons why we have regulatory commissions in peacetime and stabilization programs in wartime. But surely the regulatory agency itself cannot lawfully resort to such a theory, especially when to do so requires the Commission to overrule the action of State commissions which sought only to require the railroads to adhere to intrastate fares which had been found reasonable in peacetime and highly remunerative in wartime.

## ARGUMENT

### Delimitation of Appellants' Position

Because of certain statements in the opinions of the district courts below, the Court may possibly be led to misunderstand our position in these appeals. Therefore we wish to delimit the scope of our position to make it clear that we do not controvert matters settled in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144; *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489; and *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503. We have refrained from raising procedural questions in these appeals, and we acknowledge that we have no special status differing from any other party to the proceedings. We also acknowledge that it is the Commission which has the power to determine the weight to be given the facts of record and the contentions of the various parties. We contend, however, that the Commission did not follow lawful criteria either in its application of the Interstate Commerce Act or in the application of the complementary policies of that Act and the stabilization legislation.

In this brief we do not argue the question of undue preference to intrastate passengers and prejudice to interstate passengers. The Kentucky District Court did not pass upon this issue. The dissent of Commissioners Splawn, Aitchison, and Mahaffie goes into the issue in considerable

detail, and the State appellants in the companion appeals will deal with the question fully.

## I

### THE COMMISSION FAILED TO APPLY THE CONTROLLING CRITERION IN REACHING ITS BASIC FINDING THAT THERE HAS BEEN AN UNDUE REVENUE DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Our argument challenges the correctness of the Commission's application of that provision of Section 13 (4) of the Interstate Commerce Act which forbids any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. This Court has held that that provision "confers on the Commission the power to raise intrastate rates so that intrastate traffic may produce its fair share of the earnings *required* to meet maintenance and operating costs and to yield a fair return on the value of property," *United States* v. *Louisiana*, 290 U. S. 70, 75; *Second Florida Log Case* (*Florida* v. *United States*), 292 U. S. 1, 5. [Italics added.] The same rule was formulated in somewhat different terms by this Court when it stated that an increase of intrastate rates could be required when "needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system." *First Florida Log Case*, 282 U. S. 194, 212.

In the light of these decisions, it is clear that the criterion for determining an undue revenue discrimination against interstate commerce is the burden on commerce resulting from an insufficient contribution by intrastate rates or fares to the required railroad revenues. Therefore, proof of the sufficiency of the intrastate rates or fares for this purpose is proof of the fairness of their contribution.[8] Hence in this and any like case, it becomes incumbent on the Commission to make determinations on two distinct questions: (1) Whether the railroad revenues are greater or less than the amount actually required for adequate and efficient transportation; and (2) whether the intrastate fares enable the intrastate traffic to make a sufficient contribution to the amount of the required revenues.

The Commission's fifth finding appears consonant with the established criterion when it states

[8] The similarity of the service rendered to the two types of traffic would normally become significant only in determing the sufficiency of the contribution. Here we are content to assume (for purposes of argument only) that the services rendered the two types of traffic are substantially the same. However, the States of Alabama, Tennessee, and North Carolina are contending, upon the basis of persuasive evidence of record, that intrastate service is generally inferior to that furnished by trains scheduled primarily for interstate service. Since the issue is one peculiarly within the competency of the States to develop, we have not argued the point in this brief.

that "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service." (561–R. 95; 592–R. I, Ex. B., p. 38.) It is only when one examines the record and report that the Commission's actual failure to apply the appropriate criterion becomes evident. Thus, in the Alabama, Tennessee, and North Carolina proceedings, the Commission made no determinations whatever as to the railroads' rates of return, and its finding on this point in the Kentucky case was vitiated by errors described in the succeeding section of this brief.

The Commission and the District Courts alike seem to have reasoned in reaching, and in sustaining, the conclusion embodied in the Commission's fifth finding along the following lines: (1) The interstate fares are reasonable; (2) the service rendered interstate and intrastate passengers is approximately the same; (3) but the intrastate fares are lower; (4) therefore, the traffic moving under the intrastate fares is not contributing its fair share of the revenues required to provide adequate and efficient transportation service.

The *non sequitur* is patent. Not only did the Commission fail to establish the level of revenues required to provide adequate and efficient service, but neither the Commission nor the Courts considered it essential to establish that the 1.65 cents

fares were preventing a sufficient contribution to such revenues by intrastate traffic. Neither proposition was, or could be, established by a determination that the level of interstate fares was reasonable. It is, of course, quite possible at any particular time for fares to yield more revenues than the amount necessary to provide such service. Normally a "zone of reasonableness" is recognized within which all fares are regarded as reasonable. A lower fare within that zone may contribute sufficient revenue to provide adequate and efficient service, and a higher fare may contribute more than the amount required. Under such circumstances the fact that the lower fare is intrastate and the higher fare is interstate does not convert the former into a revenue burden on interstate commerce.

The Commission did not rebut the possibility that the 1.65 cents intrastate fare might thus be providing a sufficient contribution to railroad revenues. On the contrary, as dissenting Commissioners Splawn, Aitchison and Mahaffie observed:

> There is *nothing in the report or the evidence* to indicate that the revenues from the present passenger fares are less than those *required* to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact, *it does not affirmatively*

> *appear on this record* that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than *required* to enable respondent to render the character of service contemplated by section 15a. [Italics added; 561–R. 102; 592–R. I, Ex. B., p. 46.]

Such a deficiency in the record alone would suffice to invalidate the Commission's order in view of the requirement laid down by this Court in the *First Florida Log Case, supra* (282 U. S. at p. 212): "* * * it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify the conclusion" that the increase of intrastate rates was "needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system * * *."

Moreover, computations which we have made from evidence of record in the succeeding section of this brief reveal that the record was not merely negative on the issue of the adequacy of the 1.65 cents intrastate fares. We shall show that, if both the interstate and the intrastate fares had been fixed at the 1.65 cents level of the intrastate fares, the revenues yielded would have been ample to enable the railroads to render adequate and

efficient transportation service. Finally, as the last section of the brief will demonstrate, the only plausible basis which might be asserted to support the Commission's action brings the Commission squarely into collision with its legal duty to give full effect to wartime conditions and the stabilization legislation.

## II

### IF THE COMMISSION HAD SOUGHT TO APPLY THE PROPER CRITERION TO GOVERN UNDUE REVENUE DISCRIMINATION UNDER SECTION 13 (4), THE EVIDENCE OF RECORD WOULD NOT HAVE PERMITTED IT TO MAKE THE BASIC DETERMINATIONS ESSENTIAL TO SUSTAIN ITS ORDER.

A. *The evidence clearly showed that the level of revenues then prevailing was far higher than that enjoyed by the railroads in peacetime and was yielding a rate of return in excess of that needed to render adequate and efficient transportation service.*

1. *The rates of return were excessive.* No finding of rates of return was made by the Commission in the Alabama, Tennessee, and North Carolina cases, although all four records contained data, discussed below, leading to the conclusion pointed out by the dissenting Commissioners that railroad revenues were sufficient without the passenger fare increases to produce more than a fair return to the railroads. In the Kentucky, Tennessee, and North Carolina records there are

exhibits which we introduced at the hearings giving data from the railroads' reports to the Interstate Commerce Commission which enable rates of return to be determined upon a base consisting of book investment of the carriers in transportation property, plus unadjusted cash, materials and supplies, less accrued depreciation and amortization of defense projects, divided into net railway operating income before payment of Federal income and excess profits taxes. The results are as follows:

| | *Rate of Return On Depreciated Investment Base Before Federal Income Taxes* |
|---|---|
| *7 Kentucky railroads* 12 mos. ended June 30, 1943 | 18.11%.[9] |
| *8 Tennessee railroads* (592-R. I, Ex. B., p. 414) | 19.5%. (18.8% after deduction of rent for leased road equipment). |
| *7 North Carolina railroads* (561-R. 408, folio 581) | 18.3% (18.0% after deduction of rent for leased road and equipment). |

At all four hearings in these cases the railroads submitted rate-of-return evidence which fails to support the conclusions which they sought

[9] Computed by adding figures in Columns 4, 5, and 6 of Exhibit 17, 592-R. II, 1325 for the C. & O., C. N. O. & T. P., G. M. & O., I. C., L. & N., N. C. & St. L., and Southern railroads, totalling $2,740,340,(000), which is divided into net railway operating income before Federal income taxes for the same railroads for the 12 months ended June 30, 1943, (as shown in Ex. 12, 592-R. II, 1321, totalling $346,506,(000).

to derive from it. Their rate base was *undepreciated* "investment in transportation property used," Schedule 211-N as reported to the Interstate Commerce Commission, plus totals of cash, materials and supplies, *unadjusted,* to fit working capital needs, divided into net railway operating income *after all taxes,* including Federal income and excess profits taxes. The amount of the taxes is shown in the railroads' exhibits, however, and on this basis all four records show a rate of return for Class I railroads in the Southern region, for 1942, of 12.23 percent before taxes and 6.41 percent after taxes. These rates of return are the highest for the twenty-two consecutive years shown in the exhibits.[10]

In all four cases, the railroads also submitted exhibits showing the *average rate* of return for the railroads of each State from 1921 to 1942, inclusive. These exhibits do not show rates of return for any particular year, but only the average of the same undepreciated base, plus the average of unadjusted cash, materials, and supplies, divided into net railway operating income after all taxes

[10] The exhibits, with references to certain testimony of witness Tassin concerning them, were as follows:

Alabama record: 592–R. II, 882, 720–725.

Kentucky record: 592–R. II, 1285, 1203–1205, 1222.

Tennessee record: 592–R. I, 343, 143–144.

North Carolina record: 561–R. 319, 224–225.

for the 22 years.[11] Thus, the railroads' evidence, like the Commission's decision, attempted to justify wartime increases of fares by averaging in the lower earnings of peacetime years.

The Kentucky proceeding was the only one of the four in which the railroads attempted to show a rate of return for any particular year for the railroads of any one State. From the railroads' exhibit in this case, filed after the hearing (592-R. II, 1327-1334), the Commission calculated the following:

> The relation of net railway operating income to investment in railway property including cash, materials and supplies, for these respondents reflects average rates of return, after Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent. [561-R. 89; 592-R. Vol. I, Ex. B., p. 29.]

This rate base was likewise undepreciated Schedule 211-N, plus unadjusted cash, materials and supplies, divided into net railway operating income after payment of all taxes including Federal income and excess profits taxes. (See footnote 10, *ante.*) The railroads' statistician witness ad-

[11] The average rates of return weighed in proportion to miles operated within the State for the 22 years were:

| | | |
|---|---|---|
| 14 Alabama railroads | 3.11% | (592-R. II, 883) |
| 7 Kentucky railroads | 4.31% | (592-R. II, 1287) |
| 12 Tennessee railroads | 3.39% | (592-R. I, 345) |
| 11 North Carolina railroads | 3.00% | (561-R. 321) |

mitted that 80 percent of the increases of passenger fares would be expended by the railroads in such taxes. (592-R. II, 1215-1216.) Moreover, as was pointed out in the opinion of the dissenting Commissioners, on the basis of the 1940 valuation recommended by the Commission's Bureau of Valuation, the rate of return for these 7 Kentucky railroads would have been 8.15 percent for the year 1942 instead of the 5.78 percent rate accepted in the majority opinion. (592-R. I, Ex. B., p. 46.)

In addition, the record in the Kentucky case contains data from which comparisons of rates of return for the 12 months ended June 30, 1943, may be computed for 6 Kentucky railroads before and after Federal income and excess profits taxes, upon the railroads' undepreciated base and upon the depreciated investment of the respective railroads as of December 31, 1942. Although the lower intrastate fares in the four States were still in force, and the higher interstate fares were only in effect for 9 months of the period, the effect of application of the 1.65 cents fares to both intrastate and interstate traffic for the 12 months ending June 30, 1943 can be judged conservatively by subtracting one-third of the gross passenger revenues[12] from net railway operating income

[12] The amount subtracted to reflect the application of the 1.65 cent fares to all passenger traffic is much more than necessary, for still another reason, namely the fact that passenger service revenues include not only those from the coach service but also those from parlor and sleeping car service and from the mail, express, baggage and milk car services.

before Federal income and excess profits taxes. On the basis of testimony by the railroads' statistician witness that about 80 percent of the increased fares would be paid in Federal income and excess profits taxes, only 20 percent of the amount to be subtracted from net railway operating income before taxes has been taken as the amount to be subtracted after taxes. The following comparisons result:

*Comparisons of rates of return—6 Kentucky railroads[1] 12 months ended June 30, 1943*

| | Rates of Return from— | |
|---|---|---|
| | Actual net railway operating income | Net railway operating income less one-third of gross passenger revenues |
| Depreciated Investment Base: | | |
| Before Federal income and excess profits taxes | 18.26% | 15.84% |
| After all taxes | 8.12% | 7.64% |
| Railroads' Undepreciated Base: | | |
| Before Federal income and excess profits taxes | 14.29% | 12.40% |
| After all taxes | 6.35% | 5.98% |

[1] The railroads' Exhibit No. 19 gives data for 7 railroads (592-R. II, 1327-1[illegible]), but the exhibit of the Kentucky Railroad Commission, showing gross passenger revenues and net railway operating income after taxes for the 12 months (592-R. II, 1312, 1317) combines these figures for the Illinois Central and the Yazoo and Mississippi Valley; the latter is not included in the railroads' data. Therefore, the Illinois Central figures are excluded, and only 6 railroads are used in the comparisons set forth in the text. For comparison, however, before Federal income and excess profit taxes the rates of return for the 7 Kentucky railroads for the 12 months ended June 30, 1943, were as follows:

| | |
|---|---|
| Depreciated Investment Base | 18.11% |
| Railroads' Undepreciated Base | 12.78% |

The 1942 rates of return for the 7 Kentucky railroads, computed by the method described below, except that net railway operating income after all taxes is obtained directly from column 5 of Exhibit 19, were as follows:

| | *Before Federal Income and excess profits taxes* | *After all taxes* |
|---|---|---|
| Depreciated Investment Base | 14.93% | 8.19% |
| Railroads' Undepreciated Base | 10.54% | 5.78% |

These rates of return were computed from the following data: The net railway operating income after taxes for the 6 Kentucky railroads for the twelve months ended June 30, 1943, have been computed from Exhibit [illegible] Sheet 11 (592-R. II, 1317), by subtracting the total for the first six months of 1942 from the total for that year, and adding the total for the first six

months of 1943, resulting in $133,566,688. Net railroad operating income before Federal income and excess profits taxes have been computed by adding the figures of the corresponding railroads for the 12 months ended June 30, 1943, in Exhibit 12, totaling $300,302,(000) (592-R. II, 1321). The railroads' base as of the end of 1942 was obtained by adding columns 4 of Exhibit 19 for the same 6 railroads, totaling $2,101,786,929 (592-R. II, 1327-1333). The depreciated investment base as of the same date was obtained from Exhibit 17 by adding columns 4 and 5 for the same 6 railroads and subtracting column 5, resulting in $1,644,659,(000) (592-R. II, 1325).

Gross passenger revenues for the 12 months ended June 30, 1943, for the 6 Kentucky railroads were obtained by Exhibit 9; by subtracting the first six months of 1942 from the annual figures and adding the amounts for the first six months of 1943, totalling $119,326,904 (592-R. II, 1312). One-third of this amount, $39,775,635, was subtracted from the net railroad operating income of $300,302,(000) before Federal income and excess profits taxes for the same railroads, resulting in $260,526,365. Twenty percent of the amount subtracted, $7,955,127, was subtracted from the net railroad operating income after all taxes of $133,566,688, leaving $125,611,561.

There can be no doubt that these rates of return are unnecessarily high. In *Reduced Rates, 1922*, 68 I. C. C. 676, 683, 734, the Commission reduced railroad freight rates to give the railroads, as a whole, a rate of return of 6.00 percent before deduction of income taxes and 5.75 percent after taxes, despite the fact, of which judicial notice may be taken, that money rates were substantially higher then than now. The Alabama, Tennessee, and North Carolina records show that the railroad rates of return on a depreciated base before income and excess profits taxes would be 18 percent or more for various 12 month periods ended June to October, 1943, as has been shown; *supra*, p. 30; and all four records show that even upon the railroads' inflated and undepreciated base the Class I railroads of the Southern region had a rate of return of 12.23 percent before Federal income taxes or 6.41 percent for 1942 *after all taxes* (*supra*, p. 31). If only normal taxes had been treated as operating expenses, the rate of return on this base, though less than 18 percent, would certainly have been well above 6.41 percent. Clearly, therefore, the railroads

were earning more than the revenues required by law.

2. *The rate base employed by the Commission was excessive.* The base used by the Commission in the computation of the Kentucky rates of return was undepreciated "investment in transportation property used"[1] (Schedule 211-N), plus total cash, materials and supplies unadjusted for working capital purposes. (See footnote 10 *ante.*) In *Charges for Protective Service to Perishable Freight* (1936), 215 I. C. C. 684, 692, the Commission itself has held that "we cannot subscribe to the contention that the investment, unadjusted for the depreciation actually existing in the property, is the proper base upon which to compute a fair return, especially when there is competent evidence in the record from which the present value of the property may be determined. The Supreme Court has repeatedly held that, in the determination of present value, deduction must be made for accrued depreciation. *Knoxville v. Knoxville Water Co.,* 212 U. S. 1, 10, *Minnesota Rate Cases,* 230 U. S. 352, 457, 458, *Los Angeles Gas & Electric Corp.* v. *California R. Comm.,* 289 U. S. 287, 312." In a case decided December 4, 1944, Division 3 of the Commission (all of whom were in the majority in the decision involved in these appeals) concurred in the propriety of deducting accrued depreciation from the carriers' investment in order to determine

rate of return. *Passenger Fares—Detroit & Cleveland Navigation Co.*, 259 I. C. C. 301, 304.

An illustration of the excessive nature of the railroads' rate base can be derived from a comparison of the base for the Southern region for 1936 (as of December 31, 1936) with that for January 1, 1937, which the Commission found as a "final value" in the *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41, and used as a proper basis for determining rate of return. Each of the four records gives the railroads' base as $3,174,468,831 (see footnote 10 *ante*) for the Class I railroads. This amount is 130 percent of the final value of $2,440,000,000 found by the Commission in that case (226 I. C. C. at 161).

That the railroads' rate base was excessive was demonstrated by us in the course of the proceedings before the Commission. Clearly, therefore, the Commission acted arbitrarily in failing to recognize the inadmissible character of the base and to make determinations accordingly.

3. *Calculation of rate of return after payment of all taxes was not fair or just.* The rates of return for the 7 Kentucky railroads were computed by the Commission after deducting all Federal income and excess profits taxes from net railway operating income. Prior to the hearings in all of these cases, the Commission had consistently held that rates of return should be computed before deducting Federal income taxes. See *Increased Common Carrier Truck Rates in the*

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*East* (*1943*), 42 M. C. C. 633, 648–649; *Increased Railway Rates, Fares, and Charges, 1942,* 248 I. C. C. 545, 556; and *Reduced Rates, 1922,* 68 I. C. C. 676, 683. After these hearings, the Commission held in two cases that rates of return should be calculated prior to deduction of excess profits taxes. See *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.* (*1944*), 258 I. C. C. 41, 48–49, and *Passenger Fares—Detroit & Cleveland Navigation Co., supra.*[13] In the cases involved in these appeals, the action of the Commission was inconsistent with all of the above holdings.

In the *Minnelusa* case the Commission stated: "Under all the circumstances, we conclude that it is *not fair or just* that these excess profits taxes [1940 and 1941] should be shifted through rates to the shippers." 258 I. C. C. at 49 [Italics added.] For the Kentucky record the railroads' statistician witness testified that about 80 percent of the increases in the fares would be paid out again in Federal income and excess profits taxes (592–R. II, 1215–1216). The Kentucky Railroad Commission held that under such circumstances, when the railroads did not have present need for the revenues, increases which would benefit the railroads by only 20 percent were not just and

[13] In the latter case, the Price Administrator filed a petition for reconsideration of the decision. While Division 3 of the Commission expressly recognized the rule as stated above, it held that the record did not permit its application.

reasonable (592–R. II, 1072–1074). In none of the cases involved in this appeal did the Interstate Commerce Commission determine whether Federal income or excess-profits taxes, or the wartime portion of such taxes, were just and reasonable expenses to be charged to public through increased passenger fares. *Instead,* the Commission computed the Kentucky rate of return *after all taxes,* and considered figures, in all four records, of net railway operating income and net income *after all taxes* as the basis for its decision in all four cases.

We believe that the Commission's past practice of computing rates of return prior to Federal income taxes is sound.[14] But, in other public

[14] This principle has been followed by the Price Administrator in adjustments of maximum prices. For example, in *Interwoven Stocking Co. v. Bowles*, 141 F. 2d 696, the Emergency Court of Appeals upheld the Price Administrator's position that whether a manufacturer was entitled to a price increase should be determined on the basis of his earnings before income and excess profits taxes. The court said (p. 701):

"The complainant also makes the assertion that in addition to the adjustment already discussed the net income shown by its books for 1942 and 1943 should be further adjusted by deducting therefrom the income and profits taxes which it has been required to pay thereon. Its contention is that the portion of its net income remaining after the payment of taxes is the figure which should be compared with its pre-price control net income in order to determine whether it has suffered a hardship under price control. The contention is wholly without merit. If it were accepted the complainant would be accorded the right to escape its share of war-time taxation by passing the burden of its taxes on to its customers in the form of increased prices for its hosiery.

utility cases, where the regulatory authority's practice has been to consider income taxes as expenses, we have urged that this practice be departed from only with respect to wartime taxes, and, with modifications, that limitation has been observed in several instances. See *Re Washington Gas Light Co.*, 46 P. U. R. (N. S.) 1, 11, upheld without discussion of the point by the majority in *Vinson* v. *Washington Gas Light Co.*, *supra*; *Detroit* v. *Panhandle Eastern Pipe Line* (F. P. C.), 45 P. U. R. (N. S.) 203, 219, affirmed without discussion of the point in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n*, 143 F. 2d 488 (C. C. A. 8), certiorari granted, limited, No. 296, this Term; and *South American Rate Order* (F. C. C. Docket No. 6046, Report of June 22, 1943). The Supreme Court of Michigan has recently recognized that the Michigan Public Service Commission is not obligated to allow wartime taxes as expenses. *City of Detroit* v. *Michigan Public Service Commission*, 308 Mich. 706, 14 N. W. 2d 784.

In the *Minnetusa* case the Commission evidently considered itself bound by *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388 and *Georgia Ry. & Power Co.* v. *Railroad Commission*, 262 U. S. 625, to consider "normal" income taxes as

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Certainly neither the Constitution nor the act accords to the complainant any such unique tax exemption."

See also *Jamaica Gas Light Co.* v. *Nixon*, 110 Misc. 500, 181 N. Y. Supp. 623, 627; and *City of Charleston* v. *Public Service Commission*, 95 W. Va. 91.

an expense item to be deducted from income before determining rate of return, although the Commission had distinguished those precedents and held to the contrary in *Increased Common Carrier Truck Rates in East, supra.*[15] Since its decisions cited above, this Court has held that regulatory agencies are "not bound to the use of any single formula or combination of formulae in determining rates. * * * Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *Power Comm'n* v. *Hope Gas Co.* 320 U. S. 591, 602. In clinging to the rule of the *Galveston* case, the Commission seems to have regarded the formula as being of more importance than the end result which exempts railroads from wartime tax burdens and transfers those burdens to travelers and shippers through rate increases of considerable proportions.

If the Commission is now to adopt the rule of excluding only wartime taxes in deference to the *Galveston* case, the fact should be remembered that when that case arose stockholders were exempted from income taxes on dividends, and this Court held that the exemption should be considered in determining the amount of reasonable rate of return. This exemption has been repealed,

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[15] In that report the Commission said (42 M. C. C., at p. 649): "We do not agree that the rates of respondents as a whole should be fixed sufficiently high to permit them to pay income taxes, surtaxes, and excess-profits taxes and retain a normal profit."

but if the Interstate Commerce Commission is in effect to reinstitute the exemption by permitting railroads to pass either normal or, as in the present case, both normal and wartime taxes to travelers or shippers, certainly under the *Galveston* case the effect on stockholders' returns should not be neglected. Unless railroad rates of return after income taxes were set at a level sufficiently low so as to reflect this exemption, railroad investors would enjoy a privilege not accorded investors in other industries which must absorb income taxes, and the former would receive higher rates than "commensurate with returns on investments in other enterprises having corresponding risks." *Power Comm'n* v. *Hope Gas Co., supra* (320 U. S. at p. 603).

The Commission itself has pointed out that Federal income taxes are not considered as an expense item for industry generally. In its first decision in *Increased Railway Rates, Fares, and Charges, 1942, supra,* the Commission said (248 I. C. C. at 556):

> We may observe that, while taxes have been deducted in stating net railway operating income in the foregoing table, we have held, *Reduced Rates, 1922,* 68 I. C. C. 676, 683 that—
>
> "railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form

of transportation charges adjusted to enable it [them] to retain the designated fair return over and above the tax."

Congress has imposed high wartime taxes upon corporations and individuals not only to provide for war expenditures, but also to suppress inflation by levying upon excessive profits.[16] For railroad rates of return to be calculated after all taxes would be to disregard this Congressional policy. It would necessitate continued increases in railroad rates to maintain undiminished the portion of their earnings left after taxes. The inflationary potentialities of such a course were well explained by Chairman Ayres of the Federal Trade Commission in a letter to the late Senator Norris when the Stabilization Act was under consideration:[17] "if the income taxes so included in

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[16] In its report on the Revenue Bill of 1941, the House Committee on Ways and Means reported:

"In its deliberations on this measure, it has been your *committee's aim and desire to distribute the additional tax burden as equitably as possible among the several classes of taxpayers.* Due consideration has also been given to the economic and social effects of the increased levies. There was continually in mind the need for keeping to a minimum, consistent with our defense efforts, any disruption of our economy, and, at the same time, *supplying a needed restraint upon inflationary tendencies.*" (Report No. 1040, 77th Congress, 1st Session, H. R. 5417; p. 2; emphasis added.)

[17] 88 Cong. Rec. 7634–7635. Senator Norris reported to the Senate the Price Administrator's opposition in the Washington Gas Light Co. proceedings before the District of Columbia Public Utilities Commission with respect to

costs are those paid during the operating year on the preceding year's income, the practice would set up a vicious spiral. The greater amount of income taxes paid, the higher would have to be rates of charge in order to afford a gross income that would leave a clear profit in sufficient amount, and the greater would be the current taxable net income; the greater the taxable net income of the current year, the greater would be the amount of income taxes payable in the next year * * *. * * * Inasmuch as one of the purposes for which the Federal Trade Commission was created was to protect the consumer, it deems it appropriate to call the inflationary character of the above practice to your attention."

B. *The evidence of record demonstrates clearly that the lower intrastate fares were adequate.* So long as railroad rates and fares were yielding the carriers higher revenues than *required* to enable them to render adequate and efficient transportation service, the mere fact that the intrastate passenger fares were lower than those on the interstate basis cannot sustain the finding that the former were not contributing a fair share of the revenues which were required. "The mere existence of a disparity between particular rates on

the calculation of rate of return after wartime taxes, and inserted this letter in the Congressional Record. The position taken by the Price Administrator on the tax point was not criticized in Congress. Instead the proviso to section 1 of the Stabilization Act was promptly added to assure the right of intervention in like cases.

intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." *First Florida Log Case, supra* (282 U. S. at p. 212). See also *Passenger Fares and Charges in Georgia (1936)*, 214 I. C. C. 567, 571. Not only were the records deficient in evidence to show that the intrastate fares were not contributing their fair share of the required revenues, but, on the contrary, all indications of record point unequivocally to the conclusion that the intrastate fares were fully compensatory under wartime traffic conditions.

1. *The Commission had previously found the lower intrastate fares adequate.* In its 1936 decision in *Passenger Fares and Surcharges, supra*, the Commission concluded that fares on the basis of 1.5 cents per mile in the Southern region "are not unreasonable or otherwise unlawful" at the time it reduced fares for railroads in other parts of the country to the basis of 2.0 cents per mile (214 I. C. C. at 257), and in 1942 the Commission authorized increases of 10 percent "to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of" outstanding orders (248 I. C. C. 566). The Commission has not made any finding that fares of 1.65 cents per mile are unreasonably low. Hence one must conclude that, so far as the requirements of Section 15a (2) of the Interstate Commerce Act are concerned, the Commission still considers fares

of 1.65 cents per mile to be within the zone of reasonableness. If coach fares of 1.65 cents per mile satisfy the requirements of Section 15a of the Interstate Commerce Act for interstate traffic, they should also satisfy the requirements of Section 13 (4) with respect to revenue discrimination against interstate commerce, because of the "dovetailed" relationship between those sections;[18] and hence the lower intrastate fares constitute no discrimination against interstate commerce.

This conclusion is emphasized by the provisions of Section 15a of the Interstate Commerce Act which requires consideration, on the one hand, of the public need for rates and fares at the *lowest cost* consistent with the furnishing of adequate and efficient services, and, on the other hand, of the needs of the carriers for revenues to provide such service. The fixing of just and reasonable rates "involves a balancing of the investor and the consumer interests". *Power Comm'n* v. *Hope Gas Co., supra* (320 U. S. at p. 603). Nothing in the report of the Interstate Commerce Commis-

[18] "But we think that the relationship of the section to § 15a (2), already described, is such that the standard of reasonableness prescribed by the latter is that necessarily set up for § 13 (4) which supplements it. The considerations already detailed which define that standard for § 15a necessarily define it for § 13 (3) and (4), which creates a duty in 'dovetail' relationship to that imposed by § 15a." *United States* v. *Louisiana*, 290 U. S. 70, 78.

sion indicates that it balanced these interests by determining whether it should not require maintenance of fares at the *lowest* reasonable cost at a time when the railroads did not need the added revenues to earn maintenance and operating costs plus a fair return.

2. *The Commission had already added wartime increases of 10 percent to existing fares.* It may be doubted from the facts already related whether, in the light of operating conditions actually experienced, the 10 percent increase in passenger fares authorized in Ex Parte 148 was needed to provide for increased expenses arising from wartime conditions. However, the States authorized the same 10 percent increases in intrastate fares, and there is no issue in these proceedings as to the propriety of such actions. One can only point out that the increases were granted in 1942 to compensate for anticipated increased expenses over 1941, *Increased Railway Rates, Fares, and Charges, 1942, supra,* 248 I. C. C. 545, 550–552, 606–609, and there is no evidence to suggest that the railroads' wartime needs for added revenues have not been satisfied from this 10 percent increase, without need for further 33⅓ percent increases in Southern passenger coach fares.

3. *Increased wartime traffic has added more to railroad revenues than have the increased rates and fares.* The railroads' own evidence in all four

records shows the following data for Class I railroads in the Southern region:[19]

| | Operating Revenues | Operating Expenses (not including income taxes) | Net Railway Operating Income (after taxes) |
|---|---|---|---|
| 1941 | $698,242,859 | $472,968,083 | $138,673,394 |
| 1942 | 1,052,924,537 | 622,964,370 | 214,151,928 |

The prior peak for the 22 years shown in the railroads' exhibits came in the years 1926 and 1925 for operating revenues and net railway operating income (after all taxes), respectively. The following figures may be compared with those above:

| | Operating Revenues | Operating Expenses (not including taxes) | Net Railway Operating Income (after all taxes) |
|---|---|---|---|
| 1925 | $846,581,262 | $616,488,300 | 167,565,759 |
| 1926 | 874,464,159 | 646,031,708 | 163,046,381 |

The net railway operating income for 1929, $132,634,559, was less than for 1941 despite lower taxes in 1929.

The great importance of increased wartime traffic to revenues should not be underestimated. For example, in 1936 in *Passenger Fares and Surcharges, supra*, the Commission said (214 I. C. C. at 182):

> Thus, an increase of only 0.79 passenger in the average car occupancy for 1933 of 11.2 in the eastern district would have been sufficient, the average passenger-mile reve-

[19] For references to records see footnote 10, *ante*.

nue and average journey remaining the same, to eliminate the entire passenger deficit of $11,500,400 for 1933 in that district.

By way of comparison, in the cases here on appeal the railroads' evidence shows the ~~following~~ average car occupancies in recent years as compared with 1933:

*Revenue passenger-miles per car-mile*

| | 1933 | 1941 | 1942 | 1943 |
|---|---|---|---|---|
| 7 Kentucky Railroads (592-R. II, 1298-1299) | 8.3 | 14.8 | 23.9 | [1] 29.4 |
| 6 North Carolina Railroads (561-R. 339-340) | 6.83 | 14.01 | 23.17 | [2] 30.95 |
| 12 Tennessee Railroads (592-R. 4, Ex. B., pp. 355-356) | 8.17 | 13.52 | 22.31 | [3] 30.84 |

[1] 1st 4 mo.
[2] 1st 7 mo.
[3] 1st 8 mo.

The profitability of rail traffic has been increased not only by increased carloadings, but also by a further increase in train loadings, undoubtedly from added cars to trains.[20]

In its report which is the subject of these appeals, the Commission stated that for the year 1943 freight and passenger operating revenues for the Southern region increased 13.3 percent

[20] The revenue passenger-miles per train-mile in 1942 over 1941 increased 91 percent in Kentucky, 94 percent in North Carolina, and 94 percent in Tennessee, as compared with increases of 58, 52, and 62 percents in coach loadings for the same railroads, respectively, and 71, 71, and 73 percents in increased parlor and sleeping car-loadings, respectively. The data from which the percentages were calculated, and annotation to the Record, are set forth in Appendix C to this Brief.

and 67.9 percent over 1942, respectively. (561-R. 79; 592-R. I, Ex. B, p. 16). In the same paragraph the Commission then compared the figures for July and December 1943, evidently for the purpose of showing supposed important declines in net railway operating income and net income, both figures being after taxes. Such comparisons are entirely misleading. The reasons for the unfavorable December "net" figures are the facts that the railroads, (1) like many of us, underestimated their income tax accruals, and (2) paid retroactive wage awards following the incipient strike which caused the Secretary of War to take nominal control over the railroads at the time of the last hearing in these four cases. All of these year-end adjustments were lumped into the December monthly reports to the Commission. Because these facts occurred after the hearings in these cases, the reasons for them are not in the records, except as set forth in the Price Administrator's petition for reconsideration which contains a graph illustrating the obvious unfairness of the comparisons, and the arbitrary nature of the Commission's decision in basing any finding upon such facts (561-R. 436A; 592-R. II, 1124A). The truth is, as shown by the figures set forth above from the railroads' own evidence, that they are now more prosperous, even after all taxes, than at any time prior to this war.

4. *Passenger traffic has long been and still is being subsidized by freight rates.* Passenger service deficits prior to the war are no justification for wartime increases not presently necessary, because the Commission had previously provided for support of the passenger service from freight revenues. For example, in the *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41, the Commission authorized increases of freight rates up to 10 percent, and stated (p. 54):

> This deficit in the passenger traffic as a whole has continued from at least 1926, mounting steadily to a peak in 1932, and receding only slightly thereafter. *Passenger Fares and Surcharges*, 214 I. C. C. 174, 182. The interrelation of the freight and passenger traffic has often been commented on by us, and we have to decline to accede to the proposition again repeated here by certain protestants that we can authorize no increase in freight rates to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden. *Revenues in Western District*, 113 I. C. C. 3, 22–23; *Fifteen Percent Case, 1931*, 178 I. C. C. 539, 565; compare *General Commodity Rate Increases, 1937*, *supra*.

Since the wartime increase in passenger traffic has made the service profitable, this support from the freight traffic is no longer necessary. Furthermore, the presence of this support factor in

freight rates, multiplied by the wartime increase of freight traffic, has contributed to the extraordinarily high earnings of the railroads. Nevertheless the support factor has been allowed to continue undiminished. Obviously, the subsidy from freight traffic is a factor which the Commission should have taken into consideration in determining whether the carriers presently *require* added revenues to furnish adequate and efficient transportation services.

In its report the Commission disposed of our contention as follows:

> If freight traffic is now producing more than a fair return for the above-mentioned or any other reason, it may be dealt with in an appropriate proceeding. (561–R. 89; 592–R. I, Ex. B, p. 30.)

For the Commission to consider the freight and passenger services and revenues to have an "interrelation" in many prior decisions, and to deny such interrelation in these cases, is another demonstration of the arbitrary and capricious action of the Commission. Contrast with the attitude of the majority the statement of the dissenting Commissioners denying "that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole." (561–R. 102; 592–R. I, Ex. B, pp. 46-47.)

5. *The intrastate fares of 1.65 cents were higher than the cost of the service.* The lower in-

trastate fares were sufficient to cover operating and maintenance costs and yield a profit. The Commission's failure to make a finding on this point makes it necessary to resort to approximate determinations of operating costs from the data of record, but these data are ample to sustain this conclusion.

The average of interstate fares is not as high as 2.2 cents per mile, but is reduced by lower fares, as, for example, the interstate furlough fares of 1.25 cents per mile, considerably less than the intrastate fares on the basis of 1.65 cents per mile. The railroads' evidence in three of the records in these cases shows average revenues per passenger-mile in coaches for 1942 as set forth below. If this figure is multiplied by the average percentage of passenger operating expenses to operating revenues in the same year (the operating ratio), an approximation of the cost of the service may be secured:[21]

| | Revenue per passenger mile in coaches, 1942 | Passenger Operating ratio, 1942 | Approximation of cost per passenger-mile in coaches |
|---|---|---|---|
| 7 Kentucky railroads | 1.686¢ | 74% | 1.25¢ |
| 1[illegible] Tennessee railroads | 1.697¢ | 72% | 1.22¢ |
| 6 North Carolina railroads | 1.56¢ | 63% | .98¢ |

These cost approximations are undoubtedly too high under present traffic conditions, (1) because

[21] The data, with references to the record, are set forth in Exhibit C to this brief.

of the great increase in travel during 1943, stated by the Commission in its report as increases of 128.5 percent in coaches and 30.2 percent in parlor and sleeping cars for the first 10 months of 1943 as compared with the corresponding period of 1942 (561–R. 78; 592–R. I, Ex. B, p. 15); (2) because the operating ratios of expenses to revenues dropped considerably in 1943, and (3) because the revenues per coach-mile and per parlor and sleeping car-mile increased much more than the revenues per baggage, mail, express, and milk car (see appendix B) all of which are included in the operating ratio of passenger service expenses to revenues. The approximation of costs per passenger-mile in coaches is too high as compared with costs per passenger-mile in parlor and sleeping cars, because the operating ratio is an average for the passenger service as a whole, while coach loadings have increased considerably more than for parlor and sleeping cars.[22]

Operating ratios are themselves indications of the cost of a service. Simply stated, they show

[22] The railroads' evidence in the North Carolina Case shows this fact (561–R. 341, 342). The average passenger miles per coach-mile were 44.96 for the first 7 months of 1943 and 33.62 in 1942, as compared with 23.06 passenger miles in parlor and sleeping cars for the same period of 1943 and 19.45 in 1942. This increase of carloadings was 33.7 percent in coaches as compared with 18.6 percent in parlor and sleeping cars.

the average number of cents spent to earn a dollar. Comparisons of the war years follow:

*Passenger service operating ratios*

| [1] | 1941 | 1942 | 1943 Estimated |
|---|---|---|---|
| 12 Alabama railroads | 107 | 68 | (1) |
| 7 Kentucky railroads | 115 | 74 | [2] 61.0 |
| 6 North Carolina railroads | 101 | 63 | [3] 52.3 |
| 11 Tennessee railroads | 111 | 72 | [4] 56.0 |

[1] The ratios for the years 1937 to 1942, taken from the railroads' exhibits of record, are set forth in Appendix C. At the Alabama hearing the railroad's statistician witness testified that the figures could not be furnished for any part of 1942 (592-R. II, 749). The ratios were estimated by the OPA witness in the other three cases. The accuracy of the estimates may be judged by the fact that in its decision of December 12, 1944, in Ex Parte 148, the Commission found that the passenger service operating ratios for all Class I Southern railroads was 54.9 percent for the year 1943 (259 I. C. C. 187).

[2] 1st 6 mo. 1943; 10 Ky. railroads (592-R II, 1323).

[3] 1st 9 mo. 1943; 7 N. C. railroads (561-R. 405).

[4] 1st 9 mo. 1943; 8 Tenn. railroads (592-R. I, 411).

Despite these indications, that the lower intrastate fares were sufficient to cover operating and maintenance costs and yield a profit, the Commission did not determine whether the carriers needed the higher fares in order to receive a fair rate of return, and such failure is an error of law. *First Florida Log Case, supra* (see page 28 of this brief).

6. *The State Commissions' findings should have been given weight.* The four State commissions found that the railroads had failed to show the reasonableness of their passenger fare increases in relation to wartime income. Such action was entirely consistent with the finding by the Interstate Commerce Commission in prior deci-

sions that coach fares on the basis of 1.65 cents and 2.2 cents per mile are both reasonable. The Commission gave no presumptive weight, however, to the propriety of the States' regulation of intrastate commerce within this zone of reasonableness for interstate commerce. The Commission has held, therefore, that the railroads have managerial discretion to increase and reduce rates within this zone of reasonableness, but that the States do not have governmental authority over such changes of intrastate rates or fares. Yet the effect of the Commission's decision is to enable the railroads to invalidate State regulation merely by increasing interstate rates or fares, although the intrastate level is within the zone of reasonableness.

We do not believe that the Commission can have appreciated this effect of its order, since to deprive the States of regulatory discretion within the zone of fares recognized as reasonable by the Commission would run counter to the admonition which this Court gave to the Commission in a comparable situation. "Action of the Interstate Commerce Commission in this regard * * * must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 590–1.

## III

### THE EFFECT GIVEN BY THE COMMISSION TO WARTIME CONDITIONS WAS DIRECTLY OPPOSED TO THE POLICY OF THE STABILIZATION LEGISLATION

(a) So clear is the evidence that no increase in revenues from passenger fares was required that discovery of any explanation for the Commission's crucial fifth finding necessarily turns from present facts to conjecture as to the future. Evidently the possibility of future passenger service deficits, similar to those sustained in the past, weighed heavily with the Commission and also with both District Courts which, misconceiving the nature of the questions raised by the Commission's fifth finding, invoked this ground to defend the *reasonableness* of the interstate fares. But, as has been seen, our position does not oblige them to demonstrate that the interstate fares are unreasonable; the question for decision is only whether additional income from intrastate fares was "necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service". *First Florida Log Case, supra,* 282 U. S. at p. 215.

Even if we were to assume that in peacetime the Commission might override the judgments of State commissions on the basis of a forecast that future revenue losses would render rates or fares unduly discriminatory in the future, certainly

for the Commission to act on any such forecast under present conditions would constitute a disregard of the elementary requirement of the stabilization legislation which is directed at a *present* emergency. The Congress dealt with that emergency positively and emphatically in the Emergency Price Control Act of 1942, and still more specifically in the Stabilization Act of 1942. The danger against which Congress legislated was inflation and its remedy was stabilization. This remedy is applied to rents, prices, wages, and common carrier and utility rates. Congress recognized the danger as still continuing, and declared its policy of stabilization anew when it enacted the Stabilization Extension Act of 1944 (see footnote 23 *post*).

Obviously it is directly contrary to that policy for any price, wage or rate to be increased now, while the danger of inflation remains acute, in order to protect the beneficiary of the increase against the risk of deflation in the future. The Congress in effect has declared: Stabilize rates now to help prevent inflation now. The Commission in effect has declared: Increase rates now to help prevent deflation in the future. Yet, railroads can benefit from the latter course only because increases in the prices and wages they must pay are being held down and because the purchasing power of the passengers they serve has not been absorbed by mounting prices. If every industry with grounds to fear postwar deflation in

the future had been allowed to increase its prices or rates, ruinous inflation would be here already.[23]

The contention will be raised by appellees that a small increase in the total charge to passengers is not inflationary. For example, in the North Carolina record, the Assistant Passenger Traffic Manager of the Southern Railway System estimated that the average coach journey in North Carolina was approximately 30 miles (561-R. 170), involving a difference of 16 cents between fares of 50 and 66 cents at the rates of 1.65 and 2.2 cents per mile, respectively. The increase is proportionately large; but the fact that the number of pennies may be regarded as small does not render such an increase consistent with the war-

[23] Compare the policy of economic stabilization adopted by the Office of Price Administration approved by the Emergency Court of Appeals as having been given Congressional endorsement by the enactment of the Stabilization Extension Act of 1944. (Public Law 383, 78th Congress, 2d Sess.) In *Gillespie-Rogers-Pyatt Co.* v. *Bowles*, 144 F. 2d 361, 363, that Court quoted the following from a statement made on behalf of appellants to Congress:

"Under this [industry earnings] standard, as a general rule, price increases are allowed to compensate for those cost increases which the industry cannot absorb without impairment of its normal peacetime earnings. As a guide for determining the extent to which price increases are required under this standard, the Administrator uses a representative peacetime period, usually the years 1936–39, the base period adopted by Congress for excess-profits taxes. Where this period is not fairly representative, the years included in the period are varied or other appropriate adjustments are

time stabilization program. "The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral." *United States Gypsum Co.* v. *Brown,* 137 F. 2d 360, 364. See also *Lincoln Sav. Bank of Brooklyn* v. *Brown,* 137 F. 2d 228; and *Philadelphia Coke Co.* v. *Bowles,* 139 F. 2d 349. The Interstate Commerce Commission long ago recognized a similar principle, as, for example, in *Advances in Rates—Eastern Case,* 20 I. C. C. 243, 250.

It was objected in the course of these hearings that the interest of the general public in the proposed advances was but

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made. If, during or subsequent to the year ended October 1, 1941, costs have increased more than gross income, then, to the extent that the industry's earnings, adjusted for changes in investment, provide a smaller return before Federal income and excess-profits taxes than the industry earned in the base period, the Administrator considers an increase in the industry's maximum prices to be required by law."

The quotation by the court, set forth above, was made before the Senate Committee on Banking and Currency. See Senate Rep. 922, 78th Cong., 2d Sess., 45, 47.

As explained in the cited case (144 F. 2d at p. 363), the industry earnings standard is supplemented by a standard which allows an increase in a maximum price of a particular product made by an industry which has satisfactory over-all earnings if the price of the product fails to cover the out-of-pocket cost incurred by the industry generally on that product.

> slight, since the additional transportation charge as applied to a single article would be practically negligible, but the deduction sought to be made from this fact can not be allowed. Whatever is added to the net revenues of these defendants must be paid by someone. An increase of 1 cent per ton in the rate of transportation would hardly be perceptible in case of any commodity, and yet 1 cent per ton upon the total tonnage of the railroads of the United States, as shown by the returns to this Commission for the year 1909 would amount to $8,264,927, which forcibly illustrates the necessity of scrutinizing every advance, no matter how slight.

Here the Commission has found that the increases of intrastate fares which it has required in the four States will amount to at least $2,275,000 per year.

The Commission is not free thus to disregard the national stabilization policy. Not only in the administration of the Interstate Commerce Act must the Commission give proper consideration to the policies embodied in other acts of Congress, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80; *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31; but the Commission has been admonished by this Court that it has a duty to "give full effect to wartime conditions and the stabilization legislation." *Inter-*

*state Commerce Commission* v. *Jersey City*, 322 U. S. 503, 519. Compliance with that duty precludes it from requiring rates to be increased now on the ground that the higher rates may be needed in the future.

The Commission's action was entirely contrary to the statements in *Increased Railway Rates, Fares, and Charges 1942, supra*, 255 I. C. C. at 392, that: "The Interstate Commerce and the Price Control and Stabilization Acts declare important congressional policies which are not contradictory, but are complementary. In the administration of the Interstate Commerce Act, we give consideration, when applying the standards of lawfulness of charges made under that act, to the fact that for a Nation at war a major problem is to prevent undue inflation of prices." The Commission also said, in *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 735: "We can see no material difference between the concept of gross inequities and that contemplated by section 13 of the Interstate Commerce Act insofar as revenue discrimination against interstate commerce is concerned."

We agree that the rate making policies of the Interstate Commerce Act and the Price Control and Stabilization Act are complementary. We do not oppose increases of rates, fares, or charges, therefore, if such level of rates is below a rea-

sonable minimum,"[24] or if the carriers need additional revenues in order to provide adequate and efficient transportation services during the war, or if the increases are otherwise necessary to aid in the effective prosecution of the war or to correct those gross inequities which constitute *undue* and *unreasonable* advantages, preferences, prejudices, and discriminations.[25] But, as we have shown, the Commission has not required the carriers to demonstrate that higher fares were required to provide a needed increase in revenues. Certainly the mere fact that intrastate fares are lower than interstate fares, when the former are not shown to be yielding revenues less than those required to provide adequate and efficient service, cannot be regarded as giving rise either to a gross inequity or to an undue or unreasonable discrimination.

In the instant cases, however, when faced with our contention that the increases of intrastate fares were inconsistent with the wartime stabilization program, the Commission merely pointed

[24] Section 15a of the Interstate Commerce Act required that the Commission give consideration in its determination of the reasonableness of rates "to the need, in the *public interest*, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service."

[25] Just as Section 1 of the Stabilization Act of 1942 provides for adjustments in prices to correct *gross* inequities, so the Interstate Commerce Act, in Section 13 (4), provides for adjustments to remove *undue* or *unreasonable* advantages, preferences, prejudices, and discrimination.

to a prior statement that the provisions of the Price Control and Stabilization Acts, except those pertaining to the giving of notice and consent to intervene, "made no changes in the Interstate Commerce Act." The Commission then found that proper notice and consent had been given (561–R. 91–92; 592–R. I, 32–33). Apparently the Commission considered that in making this finding it had discharged its duties under the stabilization legislation. But the form cannot thus take the place of substance; the Commission's obligation remains "to give full effect to wartime conditions and the stabilization legislation." *Interstate Commerce Commission* v. *Jersey City*, *supra*.

(b) The Commission's disregard of its obligation to give effect to the stabilization legislation is aggravated by reason of its concurrent disregard of its duty, as declared in the statement of National Transportation Policy in the Interstate Commerce Act, "to cooperate with the several States and the duly authorized officials thereof," and its duty, as declared by this Court, to "show meticulous respect for the interests of the States." *Yonkers* v. *United States*, 320 U. S. 685, 690.

The considered decisions of the four State commissions in this case gave effect to the President's request that State authorities prevent intrastate rate increases inconsistent with the wartime stabilization program. Indeed, the Kentucky

Railroad Commission quoted this request as one of the bases for its action (592–R. II, 1071):

> The attention of all agencies of the Federal Government, *and of all State and municipal authorities*, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state, or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program. (Executive Order 9328, 8 F. R. 4681; italics added).

If sustained, the Commission's action in compelling the fares to be increased, which the State authorities had stabilized, will inevitably and seriously discourage equal vigilance in the future on the part of these and other State and local authorities.

(c) Even if the Commission might in a proper case base a Section 13 (4) order on a finding as to future rather than present revenue requirements, the present case would not provide a proper occasion for such an action.

The Commission has recognized that the high level of passenger revenues is attributable to wartime conditions. In a concluding paragraph in the section of its report on the "Level of the

Interstate Fares," the Commission declared (561–R. 81; 592–R. I, Ex. B, p. 19):

> The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads in the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943, such as inductions into the armed forces of great numbers of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movements of Army troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary.

If there is to be deflation in the postwar period, as the Commission and the District Courts seem to have assumed, then the increase in intrastate fares which the Commission is now compelling will not then be of value to the railroads here concerned. Their own experience in the pre-war deflationary period established clearly

that the 1.5 cents fare was more remunerative than the 2.0 cents fare. Hence the Commission's action cannot be justified on the score that it was simply anticipating the proper level of peacetime intrastate rates so as to provide the required volume of peacetime revenues. Once this fact is recognized, it becomes apparent that what the Commission's action amounts to is an authorization, over the objections of the State commissions having jurisdiction and the agencies of the Federal government responsible for the stabilization of prices, to the railroads to exploit the temporary shortage of competing means of transportation and thus recoup for past passenger service deficits and accumulate a surplus against the risk of future passenger service deficits.

Although the railroad freight rate structure has long included a support factor to sustain the deficits incurred in railroad passenger service, it is not unnatural that railroad managements should desire to better their past records by charging what the wartime passenger traffic would bear. But the desire to increase rates and prices under wartime conditions is one of the principal reasons why wartime stabilization legislation is an economic imperative. Certainly no regulatory authority should recognize such a basis for permitting increases not presently necessary. Still less should the Commission's action override the considered judgments of four State commissions

when, as the dissenting Commissioners Splawn, Aitchison, and Mahaffie said (561-R. 102; 592-R. I, Ex. B, p. 46):

> It does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by Section 15a.

## CONCLUSION

For the foregoing reasons, the judgments of the courts below should be reversed with directions to set aside the order of the Commission.

Respectfully submitted,

RICHARD H. FIELD,
*General Counsel,*
DAVID F. CAVERS,
*Assistant General Counsel,*
MALCOLM D. MILLER,
*Chief Counsel, Common Carrier Section,*
*Office of Price Administration.*

I have authorized the filing of this brief.

CHARLES FAHY,
*Solicitor General.*

APRIL 1945.

## APPENDIX A

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CORRECTED ORDER

(561–R. 507; 592–R. I., Ex. B., p. 1)

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of May, A. D. 1944.

No. 28963

ALABAMA INTRASTATE FARES

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No. 29000

KENTUCKY INTRASTATE FARES

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No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

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No. 29037

TENNESSEE INTRASTATE FARES

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These proceedings having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission, on March 25, 1944,

having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

*It appearing,* That as set forth in said report, and in accordance with the practice in such proceedings, the Commission left to respondents herein and the respective State Commissions, for a period of 30 days from March 30, 1944, the date of service of said report, the matter of adjusting the intrastate passenger fares under consideration in these proceedings to conform to the findings and conclusions made in said report, and that no such adjustment of the said intrastate fares has been made or authorized by the respective State Commissions:

*It is ordered,* That respondents in each of these proceedings, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 1, 1944, upon notice to this Commission and to the General public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain, from practicing the undue prejudice and preference and the unjust discrimination found in said report to exist.

*It is further ordered,* That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 1, 1944, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and

apply, passenger fares for intrastate transportation in the respective States which shall be on bases no lower than the passenger fares presently maintained and applied by the respective respondents for like accommodations in interstate transportation to, from, and through the respective States; provided, that the resulting aggregate charge made by any of said respondents for intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent in interstate transportation to, from, or through such State.

*And it is further ordered,* That this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL]

W. P. BARTEL,
*Secretary.*

# APPENDIX B

## Statutes Involved

### SECTION 13 (4) OF THE INTERSTATE COMMERCE ACT

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

## SECTION 15a OF THE INTERSTATE COMMERCE ACT

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

## SECTION 1 (a) OF THE EMERGENCY PRICE CONTROL ACT OF 1942

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pen-

sions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

## SECTION 1 OF THE STABILIZATION ACT OF 1942

In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this

Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

# APPENDIX C

**Abstract of Data Showing Passenger Traffic and Revenue Trends**

**7 KENTUCKY RAILROADS**

[Railroads Exhibit No. 6]

| Year | 1937 | 1938 | 1939 | 1940 | 1941 | 1942 | 1st 4 mo. 1943 |
|---|---|---|---|---|---|---|---|
| Revenue Passenger Miles per Train Mile (592-R. II, 1296-7) | 48.3 | 39.4 | 43.9 | 48.6 | 62.7 | 119.7 | 162.5 |
| Passenger Miles per Car Mile: | | | | | | | |
| In Coaches (592-R. II, 1299) | 15.60 | 12.33 | 14.25 | 15.77 | 19.53 | 30.85 | ........ |
| In Parlor and Sleeping Cars (592-R. II, 1300) | 9.37 | 8.78 | 8.61 | 8.91 | 10.75 | 18.38 | ........ |
| Revenue per Passenger Mile: | | | | | | | |
| In Coaches (592-R. II, 1291) | 1.517¢ | 1.772¢ | 1.482¢ | 1.437¢ | 1.506¢ | 1.686¢ | ........ |
| In Parlor and Sleeping Cars (592-R. II, 1292) | 2.308¢ | 2.346¢ | 2.396¢ | 2.294¢ | 2.333¢ | 2.567¢ | ........ |
| Revenue per Car Mile: | | | | | | | |
| In Coaches (592-R. II, 1292) | 23.65¢ | 21.85¢ | 21.12¢ | 22.66¢ | 29.41¢ | 52.02¢ | ........ |
| In Parlor and Sleeping Cars (592-R. II, 1293) | 21.63¢ | 20.59¢ | 20.63¢ | 20.32¢ | 25.08¢ | 47.17¢ | ........ |
| Revenue per Baggage, Mail, Express and Milk Car (592-R. II, 1291) | 26.20¢ | 25.46¢ | 25.35¢ | 25.27¢ | 25.96¢ | 28.44¢ | ........ |
| Index of Tax Accruals Passenger (1936=100) (592-R. II, 1293) | 103 | 107 | 115 | 138 | 201 | 494 | ........ |
| Operating Ratios (592-R. II, 1289): | | | | | | | |
| Passenger | 130% | 131% | 132% | 136% | 115% | 74% | ........ |
| Freight | 63% | 62% | 61% | 60% | 57% | 50% | ........ |

**6 NORTH CAROLINA RAILROADS (EXCEPT AS INDICATED)**

[Railroads' Exhibit No. 9]

| Year | 1937 | 1938 | 1939 | 1940 | 1941 | 1942 | 1st 7 mo. 1943 |
|---|---|---|---|---|---|---|---|
| Revenue Passenger Miles per Train Miles (561-R. 335-6) | 47.53 | 37.60 | 46.16 | 53.75 | 75.11 | 145.85 | 211.10 |
| Passenger Miles per Car mile: | | | | | | | |
| In Coaches (561-R. 341) | 14.74 | 10.81 | 14.46 | 17.11 | 22.05 | 33.62 | 44.98 |
| In Parlor and Sleeping Cars (561-R. 342) | 9.82 | 9.37 | 9.02 | 9.32 | 11.36 | 19.45 | 23.06 |
| Revenues per Passenger Mile (561-R. 328): | | | | | | | |
| In Coaches | 1.494¢ | 1.806¢ | 1.395¢ | 1.362¢ | 1.403¢ | 1.560¢ | -------- |
| In Parlor and Sleeping Cars) (5 railroads) | 2.286¢ | 2.399¢ | 2.405¢ (4 railroads) | 2.351¢ | 2.448¢ | 2.694¢ | -------- |
| Revenue per Car Mile (561-R. 329): | | | | | | | |
| In Coaches | 22.02¢ | 19.51¢ | 20.17¢ | 23.30¢ | 30.95¢ | 52.44¢ | -------- |
| In Parlor and Sleeping Cars (5 railroads) | 22.44¢ | 22.48¢ | 21.68¢ (4 railroads) | 21.91¢ | 27.79¢ | 52.40¢ | -------- |
| Revenue per Baggage, Mail, Express and Milk Car (10 North Carolina Railroads) (561-R. 327) | 24.84¢ | 24.39¢ | 24.44¢ | 23.58¢ | 24.44¢ | 25.92¢ | -------- |
| Index of Tax Accruals Passenger (1936=100) (561-R. 330) (11 railroads) | 112 | 114 | 118 | 136 | 227 | 607 | -------- |
| Operating Ratios (561-R. 324): | | | | | | | |
| Passenger | 117% | 125% | 124% | 123% | 101% | 63% | -------- |
| Freight | 67% | 67% | 64% | 64% | 60% | 55% | -------- |

## 11 TENNESSEE RAILROADS (EXCEPT AS INDICATED)

[Railroads' Exhibit No. 6]

| Year | 1937 | 1938 | 1939 | 1940 | 1941 | 1942 | 1st 8 mo. 1943 |
|---|---|---|---|---|---|---|---|
| Revenue Passenger Miles per Train Mile (592-R. I, 353-4) | 46.14 | 37.55 | 41.73 | 45.78 | 61.81 | 119.94 | 189.11 |
| Passenger Miles per Car Mile: | | | | | | | |
| In Coaches (592 R. I, 356) | 14.01 | 10.80 | 12.50 | 13.89 | 17.60 | 28.51 | ........ |
| In Parlor and Sleeping Cars (592-R. I, 357 | 9.32 | 8.82 | 8.61 | 8.75 | 11.07 | 19.12 | ........ |
| Revenue per Passenger Mile: | | | | | | | |
| In Coaches (592-R. I, 348) | 1.524¢ | 1.774¢ | 1.477¢ | 1.446¢ | 1.515¢ | 1.697¢ | ........ |
| In Parlor and Sleeping Cars (592-R. I, 349) | 2.246¢ | 2.311¢ | 2.358¢ | 2.300¢ | 2.285¢ | 2.483¢ | ........ |
| Revenue per Car Mile: | | | | | | | |
| In Coaches (592-R. I, 349) | 21.35¢ | 19.15¢ | 18.59¢ | 20.09¢ | 26.66¢ | 48.36¢ | ........ |
| In Parlor and Sleeping Cars (592-R. I, 350) | 20.94¢ | 20.38¢ | 20.30¢ | 20.12¢ | 25.29¢ | 47.47¢ | ........ |
| Revenue per Baggage, Mail, Express and Milk Car (592-R. I, Ex. B, p. 348) | 25.44¢ | 24.09¢ | 24.12¢ | 24.57¢ | 25.36¢ | 27.71¢ | ........ |
| Index of Tax Accruals Passenger (1936=100) (592-R. I, 351) | 103 | 119 | 117 | 119 | 126 | 331 | ........ |
| Operating Ratios (592-R. I, Ex. B, p. 346): | | | | | | | |
| Passenger | 124% | 131% | 132% | 133% | 111% | 72% | ........ |
| Freight | 68% | 66% | 65% | 64% | 60% | 58% | ........ |

## 13 ALABAMA RAILROADS (EXCEPT AS INDICATED)

| Year | 1937 | 1938 | 1939 | 1940 | 1941 | 1942 |
|---|---|---|---|---|---|---|
| Passenger Train Revenue per Passenger-Carrying Car-Mile (592-R. II, 874) | 15.72¢ | 14.65¢ | 14.56¢ | 15.41¢ | 19.95¢ | 36.54¢ |
| Revenue per Passenger-Mile in Southern Region 592-R. II, 1046-A): | | | | | | |
| In Coaches | ........ | ........ | ........ | ........ | 1.45¢ | 1.61¢ |
| In Parlor and Sleeping Cars | ........ | ........ | ........ | ........ | 2.37¢ | 2.56¢ |
| Revenue per Baggage, Mail, Express and Milk Car (592-R. II, 875) | 23.61¢ | 22.08¢ | 22.06¢ | 21.89¢ | 23.76¢ | 25.74¢ |
| Index of Tax Accruals (14 railroads) (1936=100) 592-R. II, 876 | 105 | 113 | 118 | 129 | 202 | 496 |
| Operating Ratios (12 railroads): | | | | | | |
| Passenger (592-R. II, 879) | 121% | 128% | 128% | 127% | 107% | 68% |
| Freight | 69% | 68% | 66% | 67% | 62% | 58% |

U. S. GOVERNMENT PRINTING OFFICE: 1943